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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1967

No. 784

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,
Debtor,

* * * * * *

~~CITY OF HAMMOND, INDIANA, a Municipal Corporation,~~ and WOODMAR REALTY COMPANY, an Indiana Corporation,
Petitioners,

vs.

WALTER A. McLEAN, TRUSTEE, and HERSCHEL B. DAVIS,
Respondents.

} In Proceedings for the Reorganization of a Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinions Of The Court Of Appeals And The District Court Are Appended.)

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(Opinions Of The Court Of Appeals And The District Court Are Appended.)

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The decision of the Court of Appeals sought to be reviewed was rendered in the eighth appeal in a reorganization proceedings commenced by the filing of an involuntary petition under Chapter X of the Bankruptcy Act. The proceedings have been pending since January 13,

1941. On this date, four alleged holders of City of Hammond Special Improvement Bonds filed an involuntary petition seeking the corporate reorganization of petitioner Woodmar Realty Company, an Indiana corporation.

The Woodmar Realty Company, as debtor, appeared on January 24, 1941, and filed an answer consenting to reorganization under Chapter X. On January 24, 1941, the District Court, Honorable Thomas W. Slick presiding, entered an order classifying claims. Special assessment improvement bonds and coupons which represented purported lien rights upon the debtor's property were classified as "Class 2" claims. On November 22, 1941, an amended plan of reorganization was confirmed by the District Court and the Trustee was ordered to file objections to the "Class 2" claims. No objections to the "Class 2" claims were ever prepared or filed by the then Trustee, Charles L. Surprise, or his successor, respondent Walter A. McLean.

Because the Trustee had failed and refused to file objections to the "Class 2" claims as required by the order of November 22, 1941, the Woodmar Realty Company filed objections to the "Trustee's Final Report, etc." and separate objections to the 300 individual "Class 2" claims. Thereupon, the Trustee, Walter A. McLean, filed a Motion to Strike all the Separate Objections of the debtor to the Class 2 claims. He also filed a Motion to Strike the Debtor's Objections to his "Final Report, etc.". Certain of the Class 2 claimants filed Motions to Strike Out the Objections to their claims. All of the Motions to Strike, Dismiss and Expunge, were on the same general ground, to-wit: that the debtor and stockholders were not "parties in interest" and, consequently, had no standing or right to objection to either the lien claims or the "Trustee's

Final Report, etc.". All of the Motions to Strike were sustained on March 5, 1956. The order of the District Court was appealed to the Court of Appeals for the Seventh Circuit and reversed on February 27, 1957, the Court holding that Woodmar Realty Company was a "party in interest" and had a right to be heard on its objections. (*In the Matter of the Woodmar Realty Co.*, (1957) 241 F. 2d 768.)

On July 10, 1957, and again on July 16, 1957, the question of disposing of as many claims as possible through settlement was discussed with the Court. **The settlement suggestion emanated from the District Court,** and the Woodmar Realty Company acquiesced only on the basis that the Trustee and his counsel remain out of the settlement negotiations in the same manner as they were required to remain out of the contest of lien claims. On July 22nd, 1957, The Woodmar Realty Company filed a petition for authority to compromise Class 2 claims. On the same date, the District Court entered an order granting the petition and giving the Woodmar Realty Company authority to negotiate with the "Class 2" lien claimants. The Trustee was instructed to remain completely passive and neutral with respect to the settlement negotiations and the entire authority and responsibility for such negotiations was given to the Woodmar Realty Company.

On January 19, 1960, the District Court entered an order denying approval of the 102 settlement agreements with lien claimants and three compromise agreements with creditors. The order was followed by an opinion filed on February 11, 1960. (Appellants' Appendix, C.A. No. 13023, pages 55-76.) On Appeal, respondent Trustee alone opposed approval of the settlement agreements. The District Court's order was reversed on November 23, 1960, C. of A. No. 13023, 284 F. 2d 815.

Following remand, and on July 21, 1961, the District Court entered an order approving the 102 settlement stipulations with lien claimants and the 3 settlement stipulations with 3 of the 4 general creditors. The Trustee did not carry out the settlement stipulations as approved. Subsequently, and on April 28, 1964, the District Court entered an order and opinion vacating the Order of July 21, 1961, approving the settlement stipulations. Woodmar's appeal from the order of April 28, 1964, was dismissed on motion of the intervening Trustee, as respondent, on September 23, 1964, on the ground that petitioner Woodmar Realty Company was no longer a party in interest and lacked standing to appeal. (Order of September 23, 1964, in C. of A. Cause No. 14756.)

The Woodmar Realty Company made numerous efforts to have lien claims set down for hearing, and obtain the dismissal of abandoned claims. One lien claim, Claim No. 441, was heard on July 15th and 16th, 1957, at Lafayette, Indiana. The successor judge entered four (4) separate opinions on this lien claim over a period of three (3) years. On appeal, the judgment on lien Claim No. 441 was affirmed. *In the Matter of the Woodmar Realty Company* (1962), 307 F. 2d 591.

From 1962 through 1965, the District Court took various actions designed to project the decision on Claim No. 441 as constituting an adjudication in favor of all remaining lien claims. This was done under "pre-trial procedures" and a "motion for summary judgment". All lien claims, settled, abandoned, or otherwise, were caused to be allowed subject to the right given lien claimants to come in and prove up rights to additional monies.

The Trustee's Supplemental Final Report, etc. (Appellants' Appendix in Nos. 15694 & 15695, pp. 305-407, incl.), except for a historical resumé, and minor changes in proposed allocations, is the same as the petition filed on September 7, 1955. The trustee proposes to "allocate" $387,422.94 to the claims listed in Exhibit "A", $14,204.00 to the Class "B" list, and $42,148.84 into the Clerk's Office for owners of special improvement bonds and coupons, if any, who have never filed so-called lien claims. The cash on hand has increased from the $460,607.70 to $486,387.48. Therefore the net "unallocated" balance is reported as $42,611.70.

Each page of Exhibits "A" and "B" contains the statement: "Allocation of cash and payment subject to pro-rata deduction for administrative expense."

The Woodmar Realty Company's objections to the trustee's supplemental final report were noticed for hearing on October 22, 1965. The fee petitions of respondent trustee Walter A. McLean and the trustee's attorney, Herschel B. Davis, were noticed for hearing on the same day. No evidence was permitted on any of the issues formed.

On February 10, 1966, the District Court entered an order approving the supplemental final report and directing payment of the proposed "allocations". Simultaneously, respondents' fee petitions were approved and allowed.

The Court of Appeals for the Seventh Circuit affirmed on June 22, 1967.

OPINIONS BELOW.

The Court of Appeals rendered a cursory opinion set out as Appendix "A", page 1a, infra. It has not been published.

The order of the District Court appealed from is appended as Appendix "B", page 9a, infra, and the District Court's opinion is appended as Appendix "C", page 15a, infra.

GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED.

The judgment sought to be reviewed is dated June 22, 1967, and was entered on the same day. Within 90 days therefrom, and upon petition filed under Rule 22, the time for filing the Petition for Certiorari was extended.

The order of the Honorable Court extending the time for filing the Petition for Certiorari was entered on September 22, 1967, and the time was extended through and including November 4, 1967.

This Court's general jurisdiction to review judgments of the Courts of Appeal in reorganization and bankruptcy cases is involved.

Specifically, the Court's jurisdiction is based upon 11 U.S.C. (Bankruptcy), § 47 (C), and 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether or not the Court of Appeals erred in approving the District Court's use of the "motion for summary judgment" concept as a means and method of avoiding any hearings on lien claims against the Woodmar Realty Company's assets.

(2) Whether or not the Court of Appeals erred in approving the District Court's abuse of discretion under Rule 16 of the Federal Rules of Civil Procedure in ordering the Woodmar Realty Company to file "statements in connection with lien claims".

(3) Whether or not the Court of Appeals erred in approving a form of trustee's report which prays for "allocations" in favor of lien claimants without regard to lack of proof of either the existence of the lien claims or the amounts, if any, which they may have coming out of the assets.

(4) Whether or not the Court of Appeals erred in approving the allowance of trustee's fees and trustee's attorney's fees in amounts approximating $130,000.00.

CONSTITUTIONAL RULES, PROVISIONS, ETC. INVOLVED.

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended December 27, 1946, effective March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

• • • • •

(28 USCA, Rule 56, page 302)

Rule 16 of the Federal Rules of Civil Procedure provides in pertinent part:

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

(28 USCA, Rule 16, page 591)

Rule 52 (a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

"Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility

of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended December 27, 1946, effective March 19, 1948."

(28 USCA, Rule 52 (a), p. 14)

Burns' Indiana Statutes Annotated, § 2-620, provides as follows:

"No action shall be brought for the foreclosure of the lien of any assessment for streets, sewers, sidewalks, ditches and other public improvements, which is not commenced within five (5) years from the time the right of action accrues: provided, however, that where any such assessment shall be payable in installments, such action may be brought at any time within fifteen (15) years from the date of the final approval of such assessment as shown by the record creating and evidencing such lien."

Burns' Indiana Statutes, 1963 Replacement, Vol. 9, Part 1, § 48-2721, at p. 346, provides as follows:

"If the property shall sell for more than enough to pay the principal, interest, attorney's fees, costs and expenses, the surplus shall be paid to the property owner or party lawfully and rightfully entitled thereto."

Section 66 of the Bankruptcy Act, 11 USCA, § 106, provides in pertinent part as follows:

"§ 106. Unclaimed moneys

a. Dividends or other moneys which remain unclaimed for sixty days after the final dividend has

been declared and distributed shall be paid by the trustee into the court of bankruptcy; and at the same time the trustee shall file with the clerk a list of the names and post-office addresses, as far as known, of the persons entitled thereto, showing the respective amounts payable to them.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That, in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends. July 1, 1898, c. 541, § 66, 30 Stat. 564; June 22, 1938, c. 575, § 1, 52 Stat. 875."

CONCISE STATEMENT OF THE CASE.

The assets of petitioner Woodmar Realty Company have been in custodia legia for twenty-five years. The majority of the 42 stockholders who consented to reorganization in the District Court have died, pendente lite, and their stock certificates transferred, from time to time, to their heirs. The President of the Woodmar Realty Company, Roscoe E. Woods, died on the witness stand in these proceedings on May 29, 1951. His widow, Helen M. Woods, who succeeded him as president, is now seventy-eight years old. Other elderly stockholders are still alive.

In the first ten years that proceedings were pending, the Woodmar Realty Company's real estate, Hammond's finest subdivision, was liquidated by the managing trustee, Charles L. Surprise, who, along with other court appointed fiduciaries, was buying up pre-depression, long defaulted City of Hammond Special Improvement Bonds,

at a few cents on the dollar. (See findings and opinion of the District Court under date of October 29, 1952, Supplemental Transcript of Record in cause No. 11783, pages 28 through 49, inclusive.)

The net cash assets, now $486,000.00, the Woodmar Realty Company successfully fought to preserve in 1951 against $287,000.00 in fiduciary fee claims and delivery of the balance to the Lake County Treasurer, acting ex officio for the City of Hammond. (See Supplemental Transcript of Record in Cause No. 11783, and order of the District Court entered on December 3, 1952, Transcript of Record in 11783, pages 193-198, inclusive.)

Since the commencement of the hearings on the fiduciaries' fee petition and the "Alternative Plan of Distribution" on April 16, 1951 (in which the Woodmar Realty Company stood alone and was successful), its counsel has been the subject of castigation, increasing in intensity as the proceedings have continued without termination.

In the first opinion of the District Court on settlements, mimeographed and mailed to all lien claimants and their counsel, in February of 1960, the conduct of Woodmar's attorney was characterized as "appalling", "reprehensible", intended to "frighten and discourage claimants from asserting their rights" and "arrogantly" calculated to deceive. (Appellant's Appendix in 13023, pages 55-76, inclusive.) Failure to terminate the proceedings is attributed solely to the Woodmar Realty Company's counsel in subsequent opinions.

Yet, the length that these proceedings have been pending is something that the Woodmar Realty Company could neither control nor influence. The trustees and their counsel are solely responsible for this situation.

There is and has been no change of circumstances since May 23, 1950 when respondent Herschel B. Davis was appointed trustee's attorney.

The same fund is on hand. The lien claimants have yet to receive a penny. The trustee's program to appropriate the cash assets as fees remains in the same position as it was in 1951. The "Trustee's Final Report; etc." is the same document, with a different title, as the trustee's "Alternative Plan of Distribution", rejected, following prolonged hearings, by the District Court's order of December 3, 1952.

The improvement bonds were not and are not the contractural obligations of the Woodmar Realty Company, but originally represented alleged statutory lien rights in its land (and other lands). When the land of the Woodmar Realty Company was sold by the Trustee, free and clear of the liens, the liens, if any, represented by the outstanding municipal bonds were transferred to the proceeds of the sale. The trustee commingled the proceeds of the sales.

During the 26 years that these proceedings have been pending, approximately 300 separate Class 2 claims had been filed by the alleged owners and/or holders of various defaulted City of Hammond special improvement bonds issued prior to 1930. On November 22, 1941, the District Court ordered Trustee Surprise to file objections to the "Class 2" claims and cause hearings to be had on the issues thus formed. No objections to the "Class 2" claims were ever prepared or filed by the then Trustee, Charles L. Surprise, or his successor, respondent Walter A. McLean, Trustee, or any hearings had thereon.

Trustee Surprise, his then attorney, and other fiduciaries, secretly and pendente lite, purchased, either direct-

ly or indirectly, large numbers of the defaulted municipal improvement bonds which they then attempted to recover on from the cash assets in the possession of Trustee Surprise.

In April of 1951, the Woodmar Realty Company filed extensive objections and other pleadings in opposition to the distribution program of Trustee Surprise and the petitions of the fiduciaries seeking an allowance of $296,000 in fees out of the then net $491,988.56 cash balance. None of the fiduciaries objected to either the distribution plan or the fee petitions of each other. Following prolonged hearings, and on October 29, 1952, **the District Court ruled in favor of the Debtor, the Woodmar Realty Company.**

Instead of filing objections to the Class 2 claims, and on September 7, 1955, the present Trustee, Walter A. McLean, filed a document entitled "Trustee's Final Report; Petition For the Determination of Amounts Due on Special Assessment Bonds and Coupons Constituting Secured Claims as Against Funds in This Matter and For an Order Directing Payment Thereof, Etc." Thereupon, the Debtor, Woodmar Realty Company filed written objections to the Trustee's Final Report, etc." and, with leave granted by the District Court, filed 274 separate sets of objections to 274 out of the 300 odd claims. (Subsequently, objections were filed to the remaining Class 2 claims.) **The issues formed on "The Amended Trustee's Final Report, etc." have not been determined.**

Respondent trustee, Walter A. McLean, and certain of the lien claimants filed motions to strike out the Woodmar Realty Company's objections on the ground that the Woodmar Realty Company was not a "party in interest". The District Court's order sustaining the motions was re-

versed on appeal to the Court of Appeals for the Seventh Circuit. *In the Matter of Woodmar Realty Company, Debtor* (1957), 241 F. 2d 768. A motion to dismiss, identical to the motion granted by the Court of Appeals on September 23, 1964, was denied, the Court of Appeals stating, in pertinent part, as follows:

> "The bankrupt has been permitted to object to allowance of claims in cases where in the event of disallowance there would be a surplus left for the bankrupt. *In re Povill*, 2 Cir., 105 F. 2d 157; *In re Hopkins*, D.C.R.I., 15 F. 2d 206 (on petition to review); cf., *In re Witherbee*, 1 Cir., 202 F. 896. The bankrupt here has brought itself within this exception to the general rule. The bankrupt's interest in having claims in excess of $300,000 disallowed, in which event a substantial surplus would be available for the bankrupt, is obviously real, and the conclusion is inescapable that under these circumstances the bankrupt is a 'party in interest'." (241 F. 2d 768, page 771)

On remand, one of the lien claims, Claim No. 441, was set down for trial. The Trustee neither filed pleadings nor did he attend the trial. Claim No. 441 and the Woodmar Realty Company's objections thereto, tried in July of 1957, is the only claim ever tried. The District Court handed down findings 4 years later, in 1961.

At the suggestion of the then Judge of the District Court, the Woodmar Realty Company filed a petition for authority to negotiate settlements. An order was entered on July 22, 1957, granting the Woodmar Realty Company and special improvement bondholders authority to enter into compromise negotiations, any compromise agreements to be subject to the approval of the court. This order was reconfirmed on August 30, 1957.

Pursuant to the orders so entered, the Woodmar Realty Company entered into settlement stipulations, filed of record, with 102 lien claimants. The Trustee filed a petition for instructions in connection therewith. Hearings were held in 1958 on the question of approval of the 102 settlement stipulations. Written notice was given all parties of record. No objections to the approval of the 102 settlement stipulations were filed or made. Notwithstanding the lack of objections, the District Judge, on January 16, 1960, entered an order denying approval of the 102 settlement stipulations. The Woodmar Realty Company, Debtor, appealed from this order. The order was reversed. *In re Woodmar Realty Company* (1960) 284 F. 2d 815. The Court of Appeals established the law of the case, in pertinent part, as follows:

> "The balance of this depleted fund would become the property of Woodmar. The more that was allowed the lien claimants, the less Woodmar would recover from its property. **The less that the claimants would receive, the more Woodmar would recover.**"
>
> • • • • •
>
> **"The pending litigation was in reality between Woodmar and the lien holders. Whether it was litigated to a finish or settled, they were the ones who would ultimately be affected thereby.** Such litigation was really an ordinary civil controversy. The parties, whether in litigating in the courtroom or in settling outside the courtroom, were engaged in an adversary activity and dealing at arms' length." (284 F. 2d 815, page 817)

Following remand, and on July 21, 1961, the District Court entered an order approving the 102 settlement stipulations. Notwithstanding the fact that the settlement stipulations so approved expressly provided for the dismissal of

the claim and immediate disbursement of the proceeds of the settlement to each of the 102 lien claimants, the Trustee failed and refused to carry out the settlement stipulations.

On September 6, 1962, 3 out of 102 lien claimants who had settled, served and filed a "Petition to Re-docket Three Claims." Following notice to the Woodmar Realty Company and oral argument held on February 28, 1964, the District Court, on April 28, 1964, entered orders with opinions vacating the 102 settlement stipulations and ordering the Trustee to reimburse Gardner and Phrommer for their appeal costs. The opinions and orders are printed in the appendix, infra.

Shortly after the Court of Appeals rendered its opinion affirming the District Court's order dismissing the Woodmar Realty Company's amended removal petition (Cause No. 13215, June 23, 1961) and on July 31, 1961 respondent trustee McLean, by his counsel, Herschel B. Davis, filed a "Motion for Summary Judgment" alleging as follows:

> "1. That Claim 441 filed in this matter was tried as a 'test case' or 'pilot claim' to determine the law as to the validity of Bankrupt's objections to all Class 2 claims.
>
> "2. That the record in this case and the court's decision on Claim 441 decided in effect that the objections filed by the Bankrupt to Class 2 claims are entirely without merit.
>
> "3. That there are no valid objections to any Class 2 claims.
>
> "4. That the Bankrupt is not a party in interest in this proceeding and has no standing herein."

Significantly, the 102 lien claims ordered approved by the Court of Appeals, were completely omitted from the

list of claims upon which summary judgment was sought; no summary judgment was asked on the 102 lien claims that were settled. On August 11, 1961, the Woodmar Realty Company served and filed its motion to strike and expunge the "Motion for Summary Judgment" on the ground that (a) neither notice nor motion was served on any of the lien claimants, (b) the "Motion for Summary Judgment" was filed in violation of the orders and mandates of the Court of Appeals in cause No. 11783 (241 F. 2d 768) and No. 13023, (284 F. 2d 815) (c) trustee McLean and the trustee's attorney, Herschel B. Davis were without power or authority, by their own admissions, and under the law of the case, to represent lien claimants in proceedings against the trust assets, and (d) the particular motion designated as a "Motion for Summary Judgment" is both unknown and unauthorized under the federal rules of civil procedure and particularly Rule 56.

Pursuant to court order, and on October 9, 1961 the Woodmar Realty Company filed its "counter-affidavit" in opposition to the recitation of the record filed by Herschel B. Davis on or about July 31, 1961 (by this affidavit, the Woodmar Realty Company denied in detail erroneous representations of fact made by the trustee's attorney, and under oath, stated facts to the contrary).

On November 28, 1962, the District Court denied the Woodmar Realty Company's motion to strike and expunge and, over objection of the Woodmar Realty Company, entered the following order:

> "It Is Therefore Ordered that with respect to each claim to which the bankrupt has objected and which has not been settled by agreement approved by this court, the bankrupt shall file a statement containing

the following information, not later than January 11, 1963:

"A. If objections have been filed based upon the statutes of limitations, the bankrupt will set forth:

"1. The date on which it claims that the statutes of limitations it cites expired.

"2. The date on which it claims that the final resolution involved was adopted.

"3. The date on which it claims that the bonds involved matured.

"4. Whether any state court foreclosure action was commenced on the roll involved and if so the date of its commencement.

"B. If objections have been filed claiming that the claim or any portion thereof was merged in a final judgment in a state court foreclosure action, the bankrupt will state:

"1. The date on which the final judgment was entered.

"2. Whether the judgment by its terms affected Woodmar property.

"3. Whether any property owned by Woodmar on the date of commencement of these proceedings is claimed by the bankrupt to have been sold in the state court action. If so, what property.

"4. Whether the bankrupt claims that the state foreclosure action was commenced after the expiration of any statute of limitations applicable. If so, the statute will be specified, and the date it is claimed to have expired will be set forth.

"C. If the bankrupt contends that any other matter connected with its objections but not set forth in A and B differentiates the claim from Claim No. 441, it will set forth such matter with specificity, describing wherein it differs from Claim No. 441.

"D. In its opinion of July 21, 1961, the court has described the proper method of computing the amount due on bonds out of this estate. Using such method, the bankrupt will state, as to each claim, the amount

it believes should be recovered by the claimant if the claim is held to be valid.

"It Is Further Ordered that the trustee will file such response to each statement as he desires not lated than January 18, 1963.

"It is Further Ordered that if the bankrupt fails to furnish the information required in A, B and C above as directed, it will be deemed to have admitted, with respect to each claim where such failure occurs, that the claim is valid under the law as established in Claim No. 441, and cannot be differentiated from that claim. If it fails to furnish the information required in D above, as directed, as to any claim, it will be deemed to have admitted that the trustee has properly arrived at the amount of that claim in his amended final report.

"Dated, this 29th day of November, 1962." (Appendix in 15694 & 15695 page 488)

Over objection and expressly reserving its rights, the Woodmar Realty Company, by its counsel, prepared, served and filed 132 separate factual statements in connection with 132 of the 300 special assessment bonds or lien claims. It was not required to file separate factual statements with regard to the 102 settlement stipulations ordered approved by the Court of Appeals. It did not file factual statements with reference to the 33 patently abandoned claims. Nor did it file separate factual statements with reference to 11 lien claims which the Woodmar Realty Company had settled, but which settlements had not yet been approved.

On May 20, 1962, without further hearing or proof, the District Court filed an opinion followed by an order directing respondent trustee to prepare and file orders allowing 49 claims in the amounts "allocated" in the amended trustee's final report, etc. filed on September 7, 1966.

(Appellant's Appendix in 15694 and 15695, pages 458-501) A similar and further "opinion" was filed by the District Court on September 23, 1963 directing the trustee to file orders allowing an additional 132 class 2 claims in the amount allocated thereto in the amended final report. (Appendix in 15694 and 15695, pages 501 to 557.)

On the same date, and without issues, hearing, or proof, the District Court made the following declaration:

> "For the reasons set forth in the court's Opinion of September 23, 1963,
>
> "It Is Ordered: That the bankrupt, Woodmar Realty Company, is not a party in interest within the meaning of Sec. 57(d) of the Bankruptcy Act, and has no standing as such in these proceedings." (Appellant's Appendix in Cause Nos. 15694 & 15695, page 557.)

ARGUMENT.

I.

THE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT, BEING UNAUTHORIZED BY EITHER THE FEDERAL RULES OR LEGAL PRECEDENT, SHOULD HAVE BEEN EITHER STRICKEN OR DENIED.

The order of February 10, 1966, ordering payment of listed lien claims as set out in Exhibits "A", "B", and "C" to the Trustee's Supplemental Final Report, is predicated, in the main, upon the granting of the Trustee's Motion for Summary Judgment. (The Trustee did not seek summary judgment on 102 out of 300 lien claims approved pursuant to the mandate and opinion of the Court of Appeals in Cause No. 13032, 284 F. 2d 815.) The law of the case, the Federal Rules, and established precedents require either the striking of the Trustee's motion or the denial of it.

A.

The Trustee's Motion Should Have Been Stricken From The Record, for Rule 56 Explicitly States Who May Move for a Summary Judgment, and the Trustee, McLean, is Not An Authorized Party.

Rule 56 explicitly lists all the necessary requirements for a proper motion, including who may move for a summary judgment. Section (a) of Rule 56 reads:

> "(a) *For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may,* at any time after the expiration of 20 days from the commencement of the action or after service of a motion for sum-

mary judgment by the adverse party, *move* with or without supporting affidavits *for a summary judgment in his favor* upon all or any part thereof.

Section (b) reads:

"(b) *For Defendant Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may,* at any time, *move* with or without supporting affidavits *for a summary judgment in his favor* as to all or any part thereof."

It is obviously clear, from the above sections, that Rule 56 does not contemplate or authorize a motion for summary judgment by a "non-party" to an adversary proceeding. In fact, the Rule's authorization of a motion by *either* the claimant or the defendant was itself a unique innovation in American Jurisprudence. Although many states have provided for a summary judgment procedure, it is usually available only to claimants, not to both parties alike. As stated by the Court of Appeals of the Second Circuit in *England* v. *Aetna Life Insurance Co.* (1943), 139 F. 2d 469:

"The federal summary judgment proceeding is the most extensive of any jurisdiction in that it is equally available to plaintiffs and defendants * * *" (At p. 472)

How then can the Trustee's motion for summary judgment be predicated upon a rule which clearly and reasonably[1] limits such a motion to either a claimant or

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[1] Otherwise, it appears as though a final judgment, with a res judicata effect, could be entered against an actual party, either claimant or defendant, without his having a chance to protect his interests. For it is usually

defendant and which, even with this limitation, is almost unique in its liberality! By his own admission, the Trustee is *not* a party to these proceedings. Quoting from the Trustee's "Notice to Creditors of Woodmar Realty Company":

> "The effect of the decision on the United States Circuit Court of Appeals is to require a decision on the objections to each of the 275 claims objected to. Many of the creditors have counsel representing them in this litigation and who have appeared for their clients in the trial court. Many other claimants have not employed counsel to represent them. *You are advised that the Trustee and his counsel cannot represent the claimants in the trial of the objections to their claims.* You are advised as to the present status of this matter so that you may take any action in regard to this claim that you believe advisable." (Appendix in 13032, page 39)

Thus, by decision of the Court of Appeals (241 F. 2d 768) as well as by his own admission, the Trustee is not a party to the present proceedings and, hence, not authorized by Rule 56 to move for a summary judgment. Such an anomaly as the Trustee's motion should have been forthrightly stricken and expunged from the record of these proceedings.

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held that since the purpose of this procedure is to expedite the disposition of cases, a summary judgment may be rendered against the party moving for judgment and in favor of the opposing party although the latter has never made any cross-motion for judgment. 3 Moore, *Federal Practice*, §56.02; 3 *Barron and Holtzoff, Federal Practice and Procedure*, §1239, pp. 178-179; *Hooker* v. *New York Life Ins. Co.* (D.C. N.D. Illinois 1946), 66 F. Supp. 313.

B.

The Trustee's Motion Should Have Been Stricken From The Record For, on its Face, it Neither Seeks a Judgment Upon a Whole Claim nor an Order Specifying the Uncontroverted Material Facts.

The District Court should, for a second reason, have stricken the Trustee's motion from the record, for, on its face, it neither seeks a final judgment upon a whole claim (or claims) nor does it seek an order specifying the uncontroverted material facts.

It is evident that the Trustee's motion is not predicated upon 56(a), for as pointed out by the Advisory Committee's note, "Rule 54(a) defines 'judgment' [as used in section (a)] as including a decree and 'any order from which an appeal lies.'" Obviously, the Trustee's motion is not seeking a final, appealable order, for it is not seeking a judgment upon any whole claim(s). Rather it seems to ask for what can only be characterized as a combination of an order establishing "conclusions of law" and a judicial pronouncement of the existence of certain "principles".

It is equally clear that such a motion can no more be based on 56(d) than it could on 56(a). The courts have been consistent in their interpretation of the interrelation of sub-sections (a) and (d). In *Biggins* v. *Oltmer Iron Works* (1946), 154 F. 2d 214, the Court of Appeals for the Seventh Circuit was faced with a situation in which the plaintiff moved for and the District Court granted what was designated as a "partial summary judgment." We quote extensively from the Court's opinion to show its construction of the interrelation of sub-sections (a) and (d):

"Of the numerous paragraphs contained in Rule 56, only (a) and (d) are material to the instant situation. Paragraph (a) provides:

> 'A party seeking to recover upon a claim, counterclaim, or cross-claim * * * may, at any time after the pleading in answer thereto has been served, move * * * for a summary judgment in his favor upon all or any part thereof.'

"True, this paragraph standing alone indicates that a plaintiff may be awarded a summary judgment for a 'part' of the claim sued upon. This paragraph, however, when a summary judgment is sought by plaintiff for only a part of his claim must be construed in connection with paragraph (d) entitled, 'Case Not Fully Adjudicated on Motion.' It provides:

> 'If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion * * * shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.'

"The language just quoted is controlling in the instant situation where judgment was neither sought nor rendered 'upon the whole case or for all the relief asked.' When such a situation is presented to a court, is it authorized to enter a partial summary judgment as was done in the instant case? Paragraph (d) plainly answers this question in the negative. It continues:

> 'It (the court) shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.'

"In other words, interpreting paragraph (d) as a whole, it appears plain that a summary judgment is not contemplated or authorized for any portion of a claim less than the whole. *When the court is confronted with such a motion as it was in the instant case, it is authorized only to make an 'order' as to the non-controverted facts.* * * *" (At pp. 216-217; emphasis added)

Hence, it is clear from the above that where a summary judgment is not sought upon the whole case—as was the situation here—the District Court is only authorized by 56(d) to issue an order of the non-controverted facts, no more and no less.

This same conclusion has been also reached by other Circuits. In *Parmelee* v. *Chicago Eye Shield Co.* (8th Cir. 1946) 157 F. 2d 582, the court stated:

"On such a motion, if judgment is not rendered on the whole case and issues must be tried, the court should specify the *facts* which appear without substantial controversy and proceed with the trial as to the facts which remain in dispute. * * *" (At p. 585; emphasis added)

In *Associates Discount Corporation* v. *Crow* (D.C. Cir. 1940), 110 F. 2d 126, the Court said:

"[W]here 'material facts are actually and in good faith controverted' the court 'shall * * * *make an order specifying the facts that appear without substantial controversy*' and direct 'such further proceedings in the action as are just.' It was therefore the duty of the trial court in the instant case to specify in a finding the facts that appeared from the pleadings without substantial controversy, and to go forward with the trial in respect to those which remained in dispute." (At p. 128; emphasis added.)

See to the same effect: *Coffman* v. *Federal Laboratories, Inc., et al.* (3rd Cir. 1948), 171 F. 2d 96; *Andi-Vision, Inc.* v. *RCA Mfg. Co.* (2nd Cir. 1943), 136 F. 2d 621.

The foremost authority on Federal Civil Procedure, Professor Moore, in his treatise on the Federal Rules (3 Moore's Federal Practice, 1938, 3175) states:

> "Rule 56(d) imposes a duty upon the court to sift the issues and to specify which *material facts* are really in issue and which are not, thereby facilitating and expediting the trial."

C.

The Trustee's Motion For Summary Judgment Was Filed In Violation of The Mandates of The Court of Appeals In Two Prior Appeals and In Violation of The Trustee's Duty To Defend The Estate.

When the Motion for Summary Judgment was filed on July 31, 1966, the District Court had before it the mandates and opinions in two (2) earlier appeals declaring that the Woodmar Realty Company was a party in interest and the true adversary of the lien claimants with the right to litigate or settle. The District Court, on June 10, 1957, at the pre-trial on 441, had determined that the burden of proof was upon the lien claimants. Regarding the lien claimants as adversaries of the trust estate, as established by the law of the case, it was the Trustee's duty to defend the estate, if he participated at all. All examined precedents disclose that, wherever the trustee has participated in adversary proceedings to establish a lien, the trustee has appeared on behalf of the estate against the third party lien claimant. (See **Collier on Bankruptcy**, 14th Ed., Vol. 3, VIII, Practice, para. 64-701. **Procedural requirements**: Filing claim to priority, p. 2246, and precedents cited therein.) Where a trustee

has taken possession of and sold property subject to an alleged lien, the lienor, himself, prosecutes his claim against the trustee. 8 C.J.S., Bankruptcy, para. 261, p. 924, "Remedies to Establish and Enforce Rights and Liens". The state law controls and is enforced by the Federal Court. 8 C.J.S., para. 262, p. 934. See also "Sale Free of Liens", 8 C.J.S., para 322(b), p. 1059, et seq. *Valid* lien claims are entitled to priority and payment. 8 C.J.S., para. 453, p. 1327.

As stated in the case of *In re*: *San Joaquin Valley Packing Co.*, (C.C.A. 9, 1924), 295 F. 311, at pages 313-14:

> "The respondent's lien on the building was not affected by the bankruptcy. The Trustee's relation to the property was the same as that of the owner prior to bankruptcy. He stood in the bankrupt's shoes, so far as the question here presented is concerned. It is only with relation to certain additional powers, conferred by special provisions of the act and not involved here, that the trustee's relationship to the property differs from that of the prior owner. Both the trustee and the respondent had an insurable interest in the building. The trustee was under no greater obligation to protect the lien of the respondent than had been the owner prior to bankruptcy. *The trustee was not trustee for fully secured lien claimants. He was trustee for the bankrupt and the unsecured creditors.* In bankruptcy proceedings these two classes of creditors stand upon widely different footing. The fully secured lien claimant has no voice in the selection of a trustee and is not entitled to vote at creditors meetings." (Italics ours)

The Trustee is under a duty to oppose such adverse lien claims and to defend the estate against them. As stated in the case of *In re*: *National Boat & Engine Co.* (D.C. Maine, 1914) 216 F. 208, at page 211:

"In pursuance of this general doctrine of the Federal Courts, it has been repeatedly held that a fund derived from the sale of property free of liens will stand as a substitute for the property sold, and will be held by the trustee for the benefit of those holding bona fide claims and liens to the extent their respective interests may appear; as a consequence of the power to order a sale free of liens, the court has jurisdiction to determine the extent and validity, and the relative priority of claims of lien holders to the proceeds. The court should also make provision for protection of the rights of the several lien creditors in the fund derived from the sale, in order that such creditors may prosecute their claims to a preference against the fund; *and it follows that the trustee in bankruptcy should appear and protect the rights of the estate in proceedings for the distribution of the fund derived from such sale.* * * * *It is the duty of the trustee to appear and protect the fund in the custody of the court.*" (Italics ours)

In the case of *In re: Cook* (D.C. Mass., 1928), 28 F. 2d 521, it is said:

"It is the rare instance in which the estate is sufficient to pay all claims and all charges against it and where there is likely to be a surplus, *it is the trustee's duty to protect the interests of the bankrupt in the surplus.*" (Italics ours)

This rule is also well stated in 8 *C.J.S., Bankruptcy,* par. 296, page 1020:

"It is his duty also to protect the estate against excessive charges for administrative expenses, and where the estate is sufficient to pay all claims and charges against it, and there is likely to be a surplus, *it is his duty to protect the bankrupt's interest in the surplus.*" (Italics ours)

D.

The Law Prohibits A Trustee's Attorney From Representing Both Sides In An Adversary Proceeding.

In filing and presenting the Motion for Summary Judgment, respondent Herschel B. Davis was acting in violation of one of the most elementary concepts of an attorney's duties—to avoid representing conflicting interests.

He could not represent the cash assets in the estate and the lien claimants against the cash assets at the same time.

As stated in *In re*: *Sun Building & Loan Association of Newark* v. *Rashkes,* (N.J., 1936) 183 A. 270:

> "An attorney cannot act on behalf of two opposing parties; and even though he may act for two parties in matters which are uncontested, his conduct is open to the most careful scrutiny. He is obliged to exhibit the most perfect good faith. He cannot prejudice one client for the benefit of another. **A scriptural passage which succinctly expresses the principles under consideration is found in Matt. vi, 24-33, as follows: 'No man can serve two masters; for either he will hate one, and love the other, or he will cling to one, and slight the other. Ye cannot serve God and mammon.'** "

Likewise, in *Gilliam* v. *Saunders, et al.,* (1903), 204 N.C. 206, 167 S.E. 799, the Court stated:

> " 'Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general will not permit a judgment or decree so affected to stand if made the subject of exception in due time by the parties injured thereby. The presumption, in such cases, is that the party was unduly influenced by that relation, and that the opposite party cannot take the benefit of it. It does not appear affirmatively in this case that Mrs.

Moore, the defendant, was not influenced to her prejudice and thrown off her guard thereby. The purity and fairness of all judicial proceedings should so appear when drawn in question.' *Molyneux* v. *Huey*, 81 N.C. 106; *Patrick* v. *Bryan*, 202 N.C. 62, 162 S.E. 207.

Moreover, the unamendable mandate of both law and morals forbids an attorney in the homely phrase of the fields, 'to run with the rabbits and bark with the hounds'.''

II.

THE DISTRICT COURT'S ORDER OF NOVEMBER 28, 1962, REQUIRING THE WOODMAR REALTY COMPANY TO FILE "STATEMENTS", CONSTITUTED AN ABUSE OF DISCRETION UNDER RULE 16 OF THE FEDERAL RULES.

After the return of this Court's mandate in No. 11783, and on June 28, 1957, the Woodmar Realty Company, by its counsel, attended a regularly noticed and scheduled pre-trial conference in Lafayette. Thereafter, and on notice, it attended a pre-trial conference in Lafayette on July 10, 1957. Woodmar attended a further pre-trial conference in the District Court in Hammond on January 29th and 30th, 1958. The parties were again in Court, on notice, on February 11th and 12th, 1960. It appeared at a further pre-trial conference on April 26, 1960. It was noticed in again for pre-trial on August 22, 1961. On November 7, 1962, an order was entered, not for a further "pre-trial" but for a hearing on the Woodmar Realty Company's motion to strike and expunge the Motion for Summary Judgment and the Trustee's Motion for Leave to Amend his Motion for Summary Judgment. The parties were not advised that a pre-trial conference was going to be held on November 27, 1962. Yet, the order requiring the Woodmar Realty Company to furnish statements was entered on the following statement by the District Court:

> "I have here what I propose as the embodiment of an order to follow the hearing here, and under my powers by virtue of Rule 16 of the Federal Rules of Civil Procedure, I believe that the court has the power to exact of the parties all of the material that is available to make a determination as to whether or not there are any genuine issues of material fact." (Transcript of Proceedings of November 27, 1962, page 36.)

The order is set forth in full at pages 18 through 20, supra, of this Brief and is incorporated herein by reference.

Rule 16 provides:

> "In any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider, etc."

Yet, the parties were not directed to appear for a conference.

Nor did the parties confer on any of the listed subjects under Rule 16:

"(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action."

The order entered does not embody any "action taken at the conference" or any other item of business lawfully authorized under Rule 16.

Rule 16 does not confer on the District Court any special power not contained in the Rule. *Syracuse Broadcasting Corp.* v. *Newhouse,* (C.A.N.Y., 1959) 271 F. 2d 910. Nor can a pre-trial conference take the place of a regular trial. *Berger* v. *Brannan,* (C.A. Colo., 1949), 172 F. 2d 241, certiorari denied 69 S. Ct. 1519, 337 N.S. 941, 93 L. Ed. 1746.

A similar order was held to be beyond the jurisdiction of the District Court in the case of *Padovani* v. *Bruchhausen* (1961), 293 F. 2d 546, from which we quote as follows:

> "First is the anomalous and even self-defeating character of the order itself. It does not in form deny the jury trial sought by the plaintiff, but it does so in substance. While it avoids the clear-cut issue sought by plaintiff in his alternative request for outright dismissal (as a basis for appeal) yet it leaves a trial necessarily abortive in nature. There must be better ways to vindicate pre-trial orders than by superfluous and hopeless trials which can be only burdensome to the litigants and the court.
>
> Second is the drastic nature of the penalty inflicted upon a litigant for what at most is an error or dereliction of his lawyer. It is to be noted that, although the defendant in its answer raised the defense of failure to state a claim for relief, that issue has not yet been considered and appears not ripe for decision; the decision which in practical effect ends the case is explicitly placed upon the lawyer's failure to comply with the court's requirements as to pre-trial. Further, there has been not so much outright default on counsel's part as a debatably inadequate compliance—an

issue in itself of some legal difficulty, as we shall presently indicate. It would seem hardly likely under these circumstances that the lay plaintiff could know or comprehend the doom about to be visited upon him, not his counsel, in time to avert it if, indeed, that were in any way possible.

Finally there is the form and content of the pre-trial procedure adopted here. And here we are constrained to conclude—with reluctance because of the extensive planning below, but with conviction of the need if pre-trial is to retain utility—that the course here followed not only is unauthorized, but is at odds with the purpose and intent of F.R. 16. That rule calls for a *conference* of counsel with the court to *prepare* for, not to avert, trial, leading to an order which shall recite the 'agreements made by the parties as to any of the matters considered.' It is subordinate and conciliatory, rather than compulsive in character. Nothing in the rule affords basis for clubbing the parties into admissions they do not willingly make; but it is a way of advancing the trial ultimately to be had by setting forth the points on which the parties are agreed after a conference directed by a trained judge.

[2] Here, however, the procedure was a kind of pre-pre-trial pleading—and special pleading at that—before hearing or conference was ever reached. So the successive orders and repleadings correspond to the motions and orders for a more definite statement of old pleading days, with more than a little of the futility therein so usual. Here over a year was consumed without ever getting to the conference stage; and the result unfortunately has been only delay and confusion, with a considerable commitment of the court to the side of the defense. Not without careful planning were the federal rules designed to eliminate the evils of special pleading, and they should not be brought back under the guise of pre-trial. See

the perceptive article: James, The Revival of Bills of Particulars under the Federal Rules, 71 Harv. L. Rev. 1473 (1958). The result is likely to be even more waste motion, with, almost inevitably, some sacrifice of the court's natural position of strict neutrality among litigants.

[3] This is shown *vividly* by the *nature* of the *disclosures* sought by the defendant and *approved* by the *court*. They were of two kinds: a demand for further particularity in the statement of the claim and a demand for the witnesses and exhibits to be offered by the plaintiff. So on the first point, defendant's original demand, which the judge incorporated in his order, was that the plaintiff state (1) 'the facts of this case,' identifying those admitted by the parties and those put in issue by the pleadings; (2) 'plaintiff's legal theory or theories of recovery'; (3) what facts plaintiff intends to prove in support of each theory; and (4) the details of plaintiff's damage. On the second, the plaintiff was required (5) to list all proposed exhibits; (6) the names and addresses of all expert witnesses, together with their field of specialization and the substance of their testimony; (7) the names and addresses of all lay witnesses and the substance of their testimony; and (8) whether he intended to seek further relief or discovery, and if so, what. And the demand for the pleading of a legal theory became ever more insistent as the proceedings continued, *so that at the end the defendant was seeking information as to detailed claims of law enumerated in several typewritten pages*. Yet if there is any characteristic of the federal rules (and indeed of code pleading generally) which is well settled, it is that a plaintiff pleads facts and not law and that the law is to be applied by the court. See, e.g., *Gins* v. *Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974, 976, and F.R. 54(c). In fact plaintiff did go beyond this to set forth in some

detail his theories of negligence and of breach of implied and express warranty. What more was or could be expected of him remains unclear. In any event, the departure here made from the pleading ideals embodied in the Federal Rules of Civil Procedure in the preclusion order against certain legal claims, based on failure to plead specially, is obvious and marked."

III.

APPROVAL OF THE TRUSTEE'S SUPPLEMENTAL FINAL REPORT WITH THE DIRECTION THAT THE TRUSTEE'S "ALLOCATIONS" BE PAID CONSTITUTES AN ABUSE OF DISCRETION AND SUCH A DEVIATION FROM THE BANKRUPTCY ACT AS TO NECESSITATE REVERSAL.

The Trustee's Final Report; Petition for the Determination of Amounts Due on Special Assessment Bonds and Coupons Constituting "Secured Claims" as Against Funds in this Matter and For An Order Directing Payment Thereof; Petition for the Determination of Costs of Administration, Including Fees for Trustee and Fees for Attorney for Trustee, and Woodmar's objections to the same are reprinted at pages 202-248, incl., in the Transcript of Record in Cause No. 11783. The order striking the Woodmar Realty Company's objections was reversed by the Court of Appeals on February 28, 1957 in the first appeal; 241 F. 2d 768. The Trustee's Final Report was amended in minor particulars on May 9, 1958, and on May 19, 1958, the Woodmar Realty Company filed its Motion to Strike and Dismiss on the ground that it failed to state sufficient facts to warrant payment of 300 liens and it constituted an abuse of process. Woodmar's objections to the Trustee's Supplemental Final Report appear at pages 437-499, incl., of the Appendix in this appeal, Cause Nos. 15694 & 15695. The order appealed from de-

nied the trustee's Motion to Strike Out the Woodmar Realty Company's Objections, denied the objections, and granted the relief prayed for by ordering payment of the listed bonds and coupons (Appendix in Cause Nos. 15694 & 15695, pp. 9 through 12, incl.).

A.

The Payment of Three Hundred (300) Lien Claims On Petition of the Trustee Without Evidence Or Proof Constitutes A Denial of the Woodmar Realty Company's Property Without Due Process Of Law.

Under the Fifth Amendment to the Constitution of the United States, the Woodmar Realty Company cannot be deprived of its assets without due process. In the case of *Burton* v. *Platter* (1893), 53 Fed. 901, 903, the Court held:

> "Chancellor Kent says: 'The better and larger definition of "due process of law" is that it means law in its regular administration through courts of justice.' 2 Kent, Comm. 13. *Certain it is that, in judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.*" (Our emphasis)

Thus, due process guarantees parties to a controversy a right to be heard and to *dispose* of their controversy by appropriate legal proceedings. *Washington-Southern Nav. Co.* v. *Baltimore & Philadelphia Steamboat Co.* (1924), 263 U.S. 629, 68 L.Ed. 480, 44 S. Ct. 220; *In re: Water Right* (D.C. Id. 1929), 30 F. 2d 436; *Traux* v. *Corrigan* (1921), 257 U.S. 312, 66 L.Ed. 254, 42 S. Ct. 124; *Postal Tele. Co.* v. *Newport* (1918), 247 U.S. 464, 62 L.Ed. 1215, 38 S. Ct. 566.

B.

The Law of the Case As Determined In The First Two (2) Appeals Precluded the District Court From Adopting a New and Different Procedure Depriving the Woodmar Realty Company of Its Right To Be Heard As An Adversary.

In considering the effect of pronouncements in previous appeals of the same cause, this Honorable Court has continuously maintained:

> "It has been settled by the decision of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second." *Roberts* v. *Cooper* (U.S. Mich., 1857), 61 U.S. 467, 20 How. 467, 15 L.Ed. 969. See also:
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> *Board* v. *Kennicott* (U.S. Ill., 1876), 94 U.S. 498, 24 L.Ed. 260
>
> *Sizer* v. *Many* (1853), 57 U.S. 98, 16 How. 98, 14 L.Ed. 861
>
> *Himely* v. *Rose* (1809), 9 U.S. 313, 5 Cranch 313, 2 L.Ed. 111

Other Courts have, in numerous decisions, held that questions decided in a previous appeal constitute the law of the case and bind *not only* the District Court but the Appellate Court as well. As stated in *Standard Sewing Mch. Co.* v. *Leslie* (C.C.A. 7, 1902), 118 F. 557, 559:

> "To solve the questions presented by the remaining assignments, it is necessary to understand the former decisions in this cause; for it is a familiar and entirely righteous rule that a court of review is precluded from agitating the questions that were made, considered, and decided on previous reviews.

The former decision furnishes 'the law of the case' not only to the tribunal to which the cause is remanded, but to the appellate tribunal itself on a subsequent writ or appeal. *Roberts* v. *Cooper*, 20 How. 467, 481, 15 L.Ed. 969: 'There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate of chances from changes in its members.'"

See also:

People v. *Illinois Cent. R. Co.*, (C.C.A. 7, 1899), 91 F. 955;

Cable v. *U.S. Life Ins. Co.* (C.C.A. 7, 1903), 111 F. 19;

Brown v. *Thom* (C.C.A. 8, 1921), 272 F. 950.

C.

The Rules Of Civil Procedure Required The Dismissal of Thirty-Two (32) Abandoned Lien Claims, Not The Payment Of Them.

The Record conclusively establishes that 32 lien claims involved dead persons, dissolved and non-existent corporations, and alleged persons who had no bonds or coupons or other interest in the proceedings. (See printed Appendix in Cause No. 13555.)

Woodmar's appeal from the order denying 32 separate Motions to Strike and Dismiss was dismissed because the order, being interlocutory in nature, was not final. *In the Matter of the Woodmar Realty Company* (1962), 307 F. 2d 505. Not only was no evidence introduced to support any "allocation" in favor of the 32 abandoned lien claims, as per example: Claim No. 233 (1121), David T. Emery; Claim No. 216 (1126), North-

western Investment Corp.; and Claim No. 232 (1121), Vera M. Dunn, but the Rules of Civil Procedure and the primary obligation of the Trustee required that they be stricken.

D.

With Regard To The One Hundred Two (102) Lien Claims, Settled and Approved Both Below And On Appeal, There Were No Proceedings Below, No Evidence Offered, No Motion for Summary Judgment, and No "Statements" to Justify "Allocations" In Their Favor.

The 102 approved and settled claims are listed in the printed Appendix in Cause No. 13023, pp. 51-53, incl. The Trustee did not move for "summary judgment" in their favor. The Woodmar Realty Company was not ordered, on November 28, 1962, to file statements in connection with these 102 lien claims.

Under the law of the case, the burden of proof was on the lien claimants. No proof was offered in support of the proposed "allocations" on October 22, 1962, (or at any other stage in the proceeding).

The Trustee's Supplemental Final Report simply ignored any requirement of proof for the proposed "allocations."

Notwithstanding the law of the case in 441, affirmed on appeal, precluding the allowance of interest beyond July 13, 1941, the Trustee's Report allocates interest up to December 1, 1954, almost 13 years at 6%!

IV.

THE ALLOWANCE OF TRUSTEE'S ATTORNEYS FEES IN THE AMOUNT OF $120,000 AND EXPENSES IN THE AMOUNT OF $3,390.96 AND TRUSTEE'S FEES IN THE AMOUNT OF $5,205.75 AND EXPENSES OF $729.96 CONSTITUTES AN ABUSE OF DISCRETION.

The gross assets of the estate totalled approximately $734,000.00. Fees and expenses allowed and paid prior to February 10, 1966, amounted to $216,993.58. (Record in Cause No. 11783, p. 175). The present allowance totals approximately $129,400.00. The fees and expenses, totalling almost 50% of the gross assets, make this estate unprecedented not only as to the length of time involved but in extravagance. Neither lien claimant, creditor, nor Woodmar have received any benefits from the proceedings. The Gary National Bank enjoyed a handsome profit until 1963.

The allowance order must be reversed and is contrary to law for each of the following reasons:

(1) No evidence was received or permitted at the hearing of October 22, 1965.

(2) It appears on the face of the opinion of January 19, 1966 (Appellants' Appendix in Cause Nos. 15694 & 15695), that the allowance is based upon bias and prejudice against the Woodmar Realty Company and its counsel rather than upon services performed in benefit of the estate as required by the Bankruptcy Act before an allowance can be made.

(3) The District Court has failed to find that the fiduciaries' services resulted in any benefit to the trust estate. The petition of respondent Davis reveals that his services consist, in the main, of hours spent in volunteer work,

not benefiting the estate. This includes representing the District Judge in mandamus actions, intervening in appeals (without court authority below), work done in connection with Claim No. 441 where he did not participate in the trial and was specifically directed to remain out of the case, and in preventing the 102 lien claimants from obtaining the benefits of the settlements.

(4) Services, volunteered, in forcing 2 appeals, No. 11783 and 13023, in which respondents were both unsuccessful.

(5) Making a claim, palpably extravagant and false, and totalling an alleged 796½—seven hour days. Eliminating Saturdays and Sundays, respondent Davis asserts that he worked a total of slightly over 3 full years computed at 5 days per week for 52 weeks per year. This is a practical impossibility.

(6) All of his alleged services have been performed, not protecting the cash assets of the estate against lien claims, but in attempting to prevent any adversary hearings on the lien claims and in preventing anyone from finding out who the lien claimants, in fact, are. These services are not compensable under the Bankruptcy Act.

The amount of the allowance on its face was violative of the statutory standard and was an abuse of the Court's discretion. *Dickinson Industrial Site, Inc.* v. *Cowan, et al.*, 309 U.S. 382, 389, 60 S.Ct. 595, 84 L.Ed. 819; *Newton, et al.* v. *Consolidated Gas Co., et al.*, 259 U.S. 101, 105, 42 S.Ct. 438, 66 L.Ed. 844; *In re*: *Solar Mfg. Corp.*, 3 Cir., 206 F. 2d 780, 781; *Coskery* v. *Roberts & Mander Corp.*, 200 F. 2d 150, 154.

Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. Some of the many other cases to the same effect are: *Callaghan, et al.* v. *Reconstruction Finance Corp.*, 297 U.S. 464, 468-469, 56 S.Ct. 519, 80 L.Ed. 804; *Wolf, et al.* v. *Weinstein, et al.*, 372 U.S. 633, 639, 89 S.Ct. 969, 10 L.Ed. 2d 33. Obviously, under Sec. 241, the Supreme Court admonition as to referees is equally applicable to their attorneys. *Finn, et al.* v. *Childs Co.*, 2 Cir., 181 F. 2d 431, 435, and cases cited therein.

Claimants have the burden of proving their worth. Furthermore, "reasonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those whom the claimant purports to act. *American United Mutual Life* v. *City of Avon Park, Fla.* (1940), 311 U.S. 138, 85 L.Ed. 91, 61 Sup. Ct. 157, 136 A.L.R. 860. Here, the claimants failed to sustain their burden.

Compensation is made only for such services as are of general benefit to the estate, and not for particularized services to such groups. *Watters* v. *Hamilton Gas Company* (1939), D.C., S.D. W.Va., 29 Fed. Supp. 436.

The statutes do not contemplate that the burden of paying for all personal services should be transferred from individual clients to the Debtor. *Teasdale* v. *Sefton Fibre Can Co.* (1936), C.C.A. 8th, 85 F. 2d 379; *Strauss* v. *Baker Company* (1937), C.C.A. 5th, 87 F. 2d 401.

Compensation should be allowed out of the Debtor's estate only for substantial and meritorious services rendered in the advancement of the reorganization proceedings and for the benefit of the estate. *Silver* v. *Scullin Steel Co.* (1938), (2 cases), C.C.A. 8th, 98 F. 2d 503;

Arcturus Radio Tube Co. (1940), D.C., D.N.J., 35 Fed. Supp. 783; *Nine North Church Street, Inc.* (1937), C.C.A. 2nd, 89 F. 2d 13.

CONCLUSION.

It is glaringly apparent that the decree sought to be reviewed purports to authorize distribution of estate assets in a manner not authorized by the Bankruptcy Act, in violation of precedents requiring pleading and proof by the lien claimants, and, in part, through an unwarranted distortion of the Federal Rules of Civil Procedure, for the benefit of two fiduciaries who have deprived legitimate parties in interest of their rights for an unprecedented number of years. Neither in conscience nor in law can they be compensated for their services in this case.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgment of the Court of Appeals may be reversed.

Respectfully submitted,

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